No. 98-1884

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IN THE

Supreme Court of the United States

CEDRIC D. SIMMS,

Petitioner,

v.

STATE OF OKLAHOMA, EX REL.,
THE DEPARTMENT OF MENTAL HEALTH AND
SUBSTANCE ABUSE SERVICES, A STATE AGENCY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

ELAINE R. JONES
DIRECTOR-COUNSEL

THEODORE M. SHAW
NORMAN J. CHACHKIN
CHARLES STEPHEN RALSTON
(*Counsel of Record*)
DEBORAH N. ARCHER
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street
Suite 1600
New York, New York 10013
(212) 965-2200

KEN FEAGINS
ATTORNEY AT LAW
629 24th Avenue, S.W.
Norman, OK 73069
(405) 360-9700

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

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PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

In its quest to avoid review of the Tenth Circuit's erroneous opinion, the respondent has distorted the factual proceedings below and obscured the legal issues posed by this Petition. Petitioner, Cedric Simms, submits this reply brief to clarify the procedural history and legal questions squarely presented for review in this case.

I. THE RESPONDENT MAKES INCORRECT FACTUAL AND LEGAL ASSERTIONS

A. *The Statement of the Case*

In the body of its brief, respondent states that "[t]he Court should consider the amendment was not even filed until after Respondent filed a motion for partial summary judgment." [R. Br. at 22]. This statement creates the erroneous impression that Mr. Simms amended his second EEOC charge *after* filing an action in federal court based on that charge. Respondent has obscured the fact that the charge at issue here, Charge II, was still pending before the EEOC, without a right-to-sue letter having been issued, when Mr. Simms filed his amendment to that charge.

On October 31, 1994, Mr. Simms filed a charge with the EEOC based on the circumstances surrounding the denial of his promotion to Fire and Safety Officer Supervisor ("Charge II"). On June 5, 1995, while Charge II was still pending, Mr. Simms filed a third EEOC charge ("Charge III") alleging retaliation for filing Charge II. On November 29, 1995, the EEOC issued a right-to-sue letter for Charge III. On January 12, 1996, Mr. Simms filed an action in the Western District of Oklahoma ("*Simms II*") based on the allegations in *Charge III*. When *Simms II* was filed, EEOC Charge II was still pending before the EEOC, and the Commission was still investigating the allegations of race discrimination.

On July 15, 1996, while Charge II was still pending, Mr. Simms filed an amendment to Charge II. The EEOC accepted the amendment, investigated the amended charge, attempted conciliation, and ultimately issued a right-to-sue letter for Charge II. On September 25, 1996, Mr. Simms filed an action in federal district court ("*Simms III*") based on the amended allegations in Charge II. Charge II and *Simms III* are at issue in this Petition.

B. *The Applicable EEOC Regulation*

The respondent's arguments are predicated on an outdated version of the EEOC regulation at issue in this case. The respondent erroneously cites and relies on a version of 29 C.F.R. §1601.12(b), the regulation governing when amendments relate back to the date of an original charge, that has not appeared in the Code of Federal Regulations for 27 years. [R. Br. at 1-2, 10]. The version quoted by respondent appeared in the C.F.R. between 1967 and 1972, and appeared at §1601.11, *not* at §1601.12, the section to which respondent attributes it. This outdated language has since been amended twice, in 1972 and 1977, to allow a broader range of amendments to relate back to the date of an original charge. *See* 37 Fed. Reg. 9215 (May 6, 1972); and 42 Fed. Reg. 47833 (Sept. 22, 1977).

The outdated 1967 regulation that respondent quotes is misleading because it specifies only a limited number of purposes for which an EEOC charge may be amended: "to cure technical defects or omissions. . . or to clarify or amplify allegations made therein." 29 C.F.R. §1601.11(b) (1967).[1] The current regulation, by contrast, specifically

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[1]The 1967 regulation states:

> A charge may be amended to cure technical defects or omissions, including failure to swear to the charge, or to clarify and amplify allegations made therein, and such amendments related back to the original filing date.

adds that "amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received." 29 C.F.R. §1601.12(b) (1999).[2] This addition significantly broadens the range of amendments that can relate back to the original filing date and makes clear that amendments relating back to the date of the original charge need not be limited to "clarify[ing] or amplify[ing]" the allegations originally in the charge.

The version relied on by the respondent was amended expressly for the purpose of allowing amendments to EEOC charges like the one at issue in this case to relate back to the date of the original charge. In the edition of the Federal Register in which the 1967 regulation quoted by respondent was first amended, the EEOC included an explanatory preface making clear its intent to avoid limiting the protections under Title VII available to laypersons based upon a narrow interpretation of the grievances mentioned in

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> However, an amendment alleging additional acts constituting unlawful employment practices not directly related to or growing out of the subject matter of the original charge will be permitted only where at the date of the amendment the allegation could have been timely filed as a separate charge.

29 C.F.R. §1601.11(b)(1967).

[2]The current regulation states:

> A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

29 C.F.R. 1601.12(b)(1999).

their original charges:

> . . . the nature of employment discrimination is complex, pervasive, and institutionalized, and. . . those filing charges may not fully comprehend the distinctions among its various forms. The Commission is under an obligation to safeguard the Federal rights of persons "* * * untutored in the technicalities of the law and who may or may not (at the time of filing the charge) be able to fully articulate their grievances or be aware of the full panoply of discriminatory practices against them or others similarly situated * * *"

37 Fed. Reg. 9215 (May 6, 1972), quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970). Although this passage referred specifically to other provisions of the C.F.R. that were amended at the same time, the language illuminates the EEOC's reasons for changing the provision governing when amendments to EEOC charges can relate back to the date of the original charge.

In its preface to the amendments, the EEOC went on expressly to recognize that a charge alleging a particular violation or legal theory under Title VII could legitimately grow to encompass other violations or legal theories:

> There is a substantial possibility that a charge which initially alleges only limited violations of title VII "may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegations* * *"

37 Fed. Reg. 9215 (May 6, 1972) quoting *King v. Georgia Power Company*, 295 F. Supp. 943, 947 (N.D. Ga. 1968). Thus, at the time it rejected the outdated version of the regulation cited by respondent, the EEOC recognized that a charge only alleging certain violations, could naturally grow to encompass "any kind of [related] discrimination."

The regulatory language which respondent misleadingly presents, and on which its arguments rely, does not reflect the recognition by the EEOC, better articulated in the current regulation, that the complexities of employment discrimination demand that charges not be restricted to the kinds or theories of discrimination originally alleged.

II. RESPONDENT ADVANCES ARGUMENTS THAT ARE IRRELEVANT TO THE QUESTION PRESENTED HERE AND THAT OBSCURE THE SPLIT IN THE CIRCUITS

The respondent devotes a substantial part of its opposition brief to attempting to explain away the clear split among the Courts of Appeals on the issue directly raised by this case: When does an amendment to a pending EEOC charge relate back to the date of the original charge? *Compare Simms v. Oklahoma*, 165 F.3d 1321, 1326-28 (10th Cir. 1999) (prohibiting amendments alleging new legal claims deriving from same set of operative facts included in the original charge); *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 963 (4th Cir. 1996) (same); *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 675 (9th Cir. 1988) (same); *Hopkins v. Digital Equip. Corp.*, 1998 WL 702339, *2 (S.D.N.Y. 1998) (same); *Lantz v. Hospital of the Univ. of Penn.*, 1996 WL 442795, *4 (E.D.Pa. 1996) (same); *with Zanders v. O'Gara-Hess*, 952 F.2d 404 (6th Cir. 1992), 1992 U.S.App. Lexis 535 (allowing amendments alleging new legal claims deriving from same operative facts included in the original charge); *Anderson v. Block*, 807 F.2d 145, 149 (8th Cir. 1986) (same); *Washington v. Kroger Co.*, 671 F.2d 1072, 1075-1076 (8th Cir. 1982) (same); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 464 (5th Cir. 1970) (same). *See also, Hornsby v. Conoco Inc.*, 777 F.2d 243, 247 (5th Cir. 1985) (dicta).

Rather than challenge the existence of the circuit split, the respondent argues that Mr. Simms' reliance on this line of cases is misplaced. In a manner that can only confuse the issues, respondent argues that the central

question before the Court is whether the retaliatory conduct complained of occurred prior to or after the EEOC charge was filed. To support this argument the respondent relies on factually and legally distinguishable cases that address the distinct issue of whether a plaintiff may seek judicial relief in a federal court complaint for discriminatory or retaliatory incidents that have never been listed in an original or amended EEOC charge. This issue is irrelevant to the question before this Court: When may an amendment to a pending EEOC charge relate back to the date the charge was originally filed?

The cases relied upon by respondent focus on the separate question of when, under the "scope of the investigation" rule or the "reasonably related" rule[3] a court can hear a claim that was never made a part of an EEOC charge. For example, in *Steffen v. Meridian Life Insurance Co.*, 859 F.2d 534 (7th Cir. 1988), the Seventh Circuit addressed the question of whether a plaintiff's claim of retaliation that was not included in the EEOC charge was "like or reasonably related to the allegations of the charge" before the court so as to be cognizable in the federal action. *Steffen*, 859 F.2d at 544. The court did not address the issue of when an amendment to an EEOC charge alleging retaliation may relate back to the date of the original charge and distinguished the case before it from cases where "the

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[3]As discussed in Mr. Simms' Petition the "scope of the investigation" and the "like or reasonably related" doctrines are inquiries distinct from the question whether amendments relate back to the date of the original charge. These two doctrines

> revolve[] around the principle that the scope of a civil action is not determined by the specific language of the charge filed with the agency, but rather, may encompass acts of discrimination which the [ ] investigation could reasonably be expected to uncover.

Conroy v. Boston Edison Co., 758 F. Supp. 54, 58 (D. Mass. 1991).

employer was given clear notice from the EEOC that retaliation was at issue." 859 F.2d at 545, n.2. *See also Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794 (10th Cir. 1997), *cert. denied,* 118 S.Ct. 342 (1997); *Malarkey v. Texaco, Inc.*, 983 F.2d 1204 (2nd Cir. 1993); *Ang v. Procter & Gamble Co.*, 932 F.2d 540 (6th Cir. 1991); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534 (7th Cir. 1988), *cert. denied*, 491 U.S. 907 (1989).

In contrast, Mr. Simms filed an amendment to his EEOC charge pursuant to 29 C.F.R. § 1601.12(b) to include retaliation as a legal claim and to explain why he believed respondent's decision not to promote him was motivated by racial discrimination and retaliation for his previous lawsuit. This amendment was filed while the underlying EEOC charge was still pending before the administrative agency. The EEOC accepted Mr. Simms' amendment, investigated the amended charge, found cause to believe that the amended charge was true, and attempted conciliation. Accordingly, the issue before the district court was not whether Mr. Simms could include in his lawsuit claims not previously subject to an EEOC charge, because he had amended his EEOC charge to include the retaliation claims prior to filing his lawsuit.

The distinction between the question presented in *Steffen*, *Ang*, *Malarkey*, and *Seymore* and that at issue in the instant case is important. The policy considerations that motivated the decisions cited by the respondent are not relevant here. The respondent's attempt to conflate the two issues only serves to underscore the dangers of severely limiting a Title VII complainant's ability to amend a pending charge to include additional legal claims stemming from the same core of operative facts as in the original charge. When the case is viewed from the proper analytic framework, the respondent's "list of horribles" of what could result disappears. This is in stark contrast to the very real dangers of applying the technical rule advocated by the respondent

to a process usually initiated by uncounselled complainants.

First, the policy considerations supporting the opinions in *Seymore*, *Malarkey*, *Steffen*, and *Ang* are distinct from those here. In those cases, the courts were motivated by the desire to protect the purposes of the EEOC filing requirement by providing notice to respondents and providing the EEOC opportunity to investigate and attempt to conciliate the retaliation claim. *See Seymore*, 111 F.3d at 800; *Malarkey*, 983 F.2d at 1209; *Ang*, 932 F.2d at 546; *Steffen*, 859 F.2d at 545, n. 2. Here, all purposes of the EEOC filing requirement were fulfilled. The respondent was given notice of Mr. Simms' retaliation claims and the EEOC thoroughly investigated the charge as amended and provided the parties with an opportunity to conciliate all claims. The purpose of the statutory exhaustion requirement is not furthered by denying a complainant the opportunity to pursue such claims in federal court.

Respondent has disingenuously argued that "unless a plaintiff indicates in the *original charge* that he engaged in some protected conduct that led to the defendant's alleged retaliatory acts, there arises no reasonable inference that retaliation has taken place" and respondent is, thereby, denied notice of the retaliation charge. [R. Br. at 12]. The respondent further states that:

> . . . a reasonable investigation of Petitioner's original charge would have looked to see if he had been denied a promotion because of his race. Nothing in the original charge would have alerted a reasonable investigator to go back in time to determine whether there had been previous EEOC filings that could possibly reveal a retaliatory motive for the failure to promote.

[R. Br. at 21]. This claim makes no sense. Even if the complainant did not mention the retaliation charge in the original charge, the standard EEOC investigation of an

employee's discrimination charge would likely reveal previous charges by the same employee against the same employer. *See EEOC Compliance Manual* §§602.6(a)(1) and (c) (1999 Commerce Clearing House Inc.).

The EEOC's formal investigation procedures begins with an inquiry into the history of the employee's relationship with the employer:

> The charging party/complainant provides all of the initial information concerning the basis and issue of the charge/complaint . . . . Background information includes, but is not limited to, a brief summary of the charging party/complainants's work history with the respondent . . . and any other information which charging party/complainant feels is relevant to the charge/complaint.

EEOC Compliance Manual §602.6(a)(1). A prior EEOC charge is likely to be a salient feature of any such history and is, therefore, likely to be among the first pieces of information gathered by the investigator.

Here, in addition to notification through the EEOC process, the respondent was undoubtedly aware of Mr. Simms' prior EEOC charge and Title VII action and that it might be at issue because its managers, Kellison and LaBoon, received a copy of the settlement order in *Simms I* and the instant charge was filed only six months after the parties reached a settlement in *Simms I*.

To adopt the *per se* rule urged by the respondent, restricting pre-filing retaliation charges but not post-filing retaliation charges, would result in the type of technical stringency this Court warned against in *Love v. Pullman*, 404 U.S. 522 (1972) and *Zipes v. Trans World Airlines, Inc. Independent Federation of Flight Attendants*, 455 U.S. 385 (1982). It neither promotes Title VII nor respects the realities of the administrative process often initiated by laypersons.

Finally, the respondent has misstated the thrust and effect of the Tenth Circuit's opinion in this case. Respondent argues that the decision rested on its determination that under *Seymore v. Shawver & Sons*, Mr. Simms' retaliation claims were not "reasonably related" to the federal complaint. [R. Br. at 26]. The respondent has lumped together two distinct lines of inquiry performed by the court of appeals in an attempt to obscure the needlessly stringent and technical rule employed by the court.

As discussed above, *Seymore* and similar cases cited by the respondent examine when a claim not included in *any* EEOC charge may still be included in a federal action. Thus, in applying the reasoning in *Seymore* to the present case the Tenth Circuit was determining under the "reasonably related rule" whether the retaliation claim could be so included. But what the respondent has ignored is that the foundation for the Tenth Circuit's "reasonably related" analysis is its determination that Mr. Simms' retaliation amendment did not relate back to the date of the original charge under §1601.12(b). To reach that conclusion the court employed the rule that amendments to an EEOC charge alleging new legal claims, even those stemming from the same core of operative facts as in the original charge, cannot relate back to the date of the original charge. This is a hyper-technical approach, divorced from the realities of the EEOC administrative process and the facts of this case.

Further belying the respondent's claim that Mr. Simms has imported a circuit split from an unrelated line of cases and misrepresented the Tenth Circuit's opinion is that court's own acknowledgement of a split in the circuits on the issue of when an amendment stating new legal claims relates back to the date of the original charge. (Pet. App. 7a-8a.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

ELAINE R. JONES
DIRECTOR-COUNSEL

THEODORE M. SHAW
NORMAN J. CHACHKIN
CHARLES STEPHEN RALSTON
(*Counsel of Record*)
DEBORAH N. ARCHER
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street
Suite 1600
New York, New York 10013
(212) 965-2200

KEN FEAGINS
ATTORNEY AT LAW
629 24th Avenue S.W.
Norman, OK 73069
(405) 360-9700

Attorneys for Petitioner